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Supreme Court of the United States

OCTOBER TERM, 1947.

No. 90

PEOPLE OF THE STATE OF ILLINOIS EX REL. VASHTI McCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, AND ELMER C. BASH AND ALICE J. BASH, AND WANDA I. BASH, A MINOR, BY ELMER C. BASH, HER FATHER AND NEXT FRIEND,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR APPELLANT.

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THE OPINIONS BELOW.

The opinion of the Supreme Court of Illinois is officially reported in 396 Illinois, 14 (1947). It appears also in 71 N.E. 2d 161. The opinion of the trial court is not officially reported, but is set forth in full in pages 60 to 89 of the transcript of record in this case.

JURISDICTION.

This matter is fully discussed in the Statement as to Jurisdiction; the Statement opposing Jurisdiction, with motion to dismiss; and the Brief opposing motion to dismiss appeal. In granting jurisdiction, this Court has assumed that there is sufficient basis for appeal on the ground that a state statutory provision is involved, although the action involved is that of a local board of education.

With respect to validity under the Constitution of the United States, the issues have "been presented for decision to the highest court of the state;" have "in fact been decided by that court;" and "its decision was necessary to the judgment." *Wilson* v. *Cook*, 327 U. S. 474.

Appellees have contended that this Court has no jurisdiction as to two issues: (1) use of public property and of public services in the religious instruction and (2) the issue as to whether appellee school board has a discretion to determine what bodies should engage in religious instruction, and what should be the manner of such instruction.

The appellant presented the issues to the Supreme Court of Illinois on the broad basis that:

> "A sectarian basis in violation of the 14th Amendment and of Article II, Section 3 and Article VIII, Section 3, of the Constitution of Illinois, is established by the development of sectarian groups in the public schools, and such a development violates freedom of religion."

That Court said that the suit was brought by a "resident and taxpayer," and stated the issue to be whether "either the Federal or State Constitution, or both, in their

guarantee of religious freedom" prohibit the plan disclosed by the record.

Although such a plan cannot be operated without the use of public property and of public services, which are essential elements of the plan, Appellees have contended that this federal constitutional issue was not presented to the Supreme Court of Illinois, before which the argument primarily applied to a specific provision of the constitution of Illinois, which forbids public aid or support of any church or sectarian purpose. In stating the general issue, as quoted above from Appellant's brief in the State Supreme Court, both the 14th Amendment and the Illinois Constitutional provisions are cited.

As indicated in Appellant's Jurisdictional Statement, her complaint was a taxpayer's action, and alleged violation of the Fourteenth Amendment both in expenditures for religious purposes and in other respects (Transcript 8, 10, 14). That the present action is a taxpayer's action is expressly recognized by the Supreme Court of Illinois. The briefs before the Supreme Court of Illinois are not before this Court, but Appellees are correct in their intimation that Appellant's brief separately discussed the provisions of the Illinois constitution which forbid preference to any religious denomination or mode of worship, and also forbid any contribution or pay from any public fund in aid of any church or sectarian purpose (Illinois Constitution, Article II, Section 3; Article VIII, Section 3). Appellant's brief also separately argued the application of an Illinois statutory provision as to other uses of public school buildings "when not occupied by schools" (Illinois Revised Statutes, 1945, Chapter 122, Section 6-43). The final construction of these state constitutional provisions and of this state statute rested with the Supreme Court of Illinois and is not presented to this Court.

Other issues discussed by Appellant's brief in the Su-

preme Court of Illinois related to freedom of religion; segregation of religious groups in public schools; and religious censorship of groups permitted or refused permission to participate in sectarian instruction in the public schools. Each of these issues was argued on the basis of the 14th Amendment and of similar provisions of the State Constitution. Appellees now assert that Appellant cannot claim that there was improper use of public property and public funds in the application of such a policy. In broadly charging interference with freedom of religion through sectarian use of public schools, Appellant's brief in the Supreme Court of Illinois made no specific statement that public schools are financed by taxation, but left to judicial notice the fact that the activities alleged to violate the Fourteenth Amendment necessarily involve the expenditure of public funds. The contention of Appellant is that sectarian education is made a part of the public school system. Public expenditure as a part of the plan here at issue is fully covered by Appellant's complaint, and is an essential element in the plan of making sectarian education a part of the public school system through the use of public schools during regular school hours.

As to a discretion of the school board to determine who should teach and how they shall teach religion, the Supreme Court of Illinois stated that "the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." The substantial amount of evidence received by the trial court upon this matter, together with the opinion of that court upon the issue, are found at pages 9-11 of this brief. Not only this, but the Supreme Court of Illinois said in its opinion that: "Questions of policy are solely for the determination of the board . . . ." And in their Statement opposing Jurisdiction, Appellees, while stating that additional groups, even atheists, are permitted to participate in religious instruction, state that:

"Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."

The record in this case presents the same issue as *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940), in which this Court held that censorship of religion is violative of the Fourteenth Amendment.

STATEMENT OF THE CASE.

This case involves religious teaching in the public schools of the City of Champaign, Illinois, during regular school hours, and in the public school buildings and class rooms. Attendance upon the public schools is compulsory, between the ages of seven to sixteen, except for attendance at private or parochial schools, and certain other limited exceptions (Illinois Revised Statutes, ch. 122, sec. 26-1). The religious teachers are selected and paid by a local non-official council of religious education. School children taking such religious education are during school hours released from secular work, and regular school rooms are provided for the religious classes. The above facts are set out by the trial court (Transcript, 61), which, in its opinion of January 12, 1946, also said that

> "religious education classes were established and maintained in the public school buildings in the City of Champaign, Illinois, for about five years last past under arrangements made between the defendant school board and a group known as 'The Champaign Council of Religious Education,' a voluntary association made up of the representatives of the Jewish, Roman Catholic and Protestant faiths in the school district" (Transcript, 61. See also Transcript, 128, 156).

Permission for such religious teaching was granted by the board of education on June 6, 1940 (Transcript, 127).

Religious teachers, who are not teachers in the public school system, teach religious classes, since 1941, of thirty minutes each week in the 4th, 5th and 6th grades of elementary schools, and fifty minutes each week in the 7th, 8th and 9th grades of the junior high school (Transcript, 91, 137), subject to the approval and supervision of the super-

intendent of schools (Transcript, 123, 127-128). There were about 35 religious education classes in the public schools in 1945 (Transcript, 91).

Cards are distributed to parents of elementary students (fourth, fifth and sixth grades) by the public school teachers (Transcript, 176) requesting that they "*please permit*" their children to attend a class in religious education. The cards, which are returned to the teacher of religion either by the public school teachers or by pupils (Transcript, 94, 133, 147, 253), indicate an opportunity to choose "Interdenominational, Protestant, Roman Catholic, Jewish" education, but there has been no interdenominational instruction except Protestant, and no Jewish instruction has taken place for three years before the beginning of this litigation (Transcript, 224, 229).

Printed schedules are distributed to junior high school students, to be filled, and the superintendent of schools testified that the words "religious education do not appear on the blank anywhere that I know of" (Transcript, 240), but Alice J. Bash, an intervenor and witness on her own and defendant's behalf, testified that her daughter wrote "Course in Religious Education" where the schedule says "Do you wish to take band, orchestra or religious education" (Transcript, 234. See also p. 252). Schedules given from the office of the school principal indicate the rooms for religious instruction of those in the junior high school (Transcript, 153).

The solicitation of elementary students is more specific than that of junior high school students, and the plan of religious education is employed primarily with the elementary groups. The President of the Council of Religious Education testified as follows:

> "In the junior high school in 1944 and 1945 there were 134 children registered in the religious education classes. There were several hundred students in junior

high school, in excess of 800. Last year in the 6th grade through the district there were 249 enrolled in the religious education classes. The total enrollment in the 6th grade is 295. In the 5th grade in the religious education class there were 206 out of a total enrollment of 286. In the 4th grade 196 out of a total enrollment of 298" (Transcript, 258).

The teacher of religion makes a report of absence of a pupil "just like any teacher would to the superintendent's office" (Transcript 224, 238).

Classes in religious education are held in the regular teaching rooms of public school buildings. The rooms are temporarily turned over to the religious teacher, and the religious classes are held during the regular school hours, the regular class being adjourned for that purpose (Transcript, 92, 137).

The public school teacher often remains in the room being used for religious education, this usually being her regular room. This is the case when all or nearly all of the children of her class take the religious teaching (Transcript, 92, 133, 137). That this would be more convenient to the public school teacher is obvious, and there is some evidence that acceptance of religious teaching was urged on this account (Transcript, 175, 178). During the period of religious instruction she is relieved from duty if all members of the class take such instruction.

In May, 1945, the board of education mimeographed 500 parent request cards (Transcript, 176, 223) on paper belonging to the school board (Transcript, 240), for the mimeographing of which it received $1.05 from Miss Chapin (Transcript, 240, 266), on behalf of the Council on Religious Education. The superintendent of schools testified that: "No moneys to my knowledge have been paid out or expended by the defendant in connection with or because of or for the benefit of the religious education classes"

(Transcript, 239). No testimony indicates probable cost to the religious organization, had it been required to furnish its own facilities; but an adequate showing of the use of public property and public service appears in the record (Transcript, 237-239). The activity of public school teachers and officers in connection with religious instruction is indicated above.

All students in the elementary classes were classified, and the several groups were segregated by the school authorities. Separate rooms were provided for Protestants, Catholics and Jews (Transcript, 105, 150, 229), although there has been no Jewish instruction for several years (Transcript, 224, 229). The Protestant group being dominant in number, the regular class rooms were usually employed for their religious teaching during what were otherwise public school class hours, with the public school teacher remaining in the room during the religious instruction (Transcript, 92, 133, 137). The Catholics were assigned other rooms (Transcript, 150). Those in the elementary grades who did not take religious education remained in their class rooms if those taking religious education went elsewhere (Transcript, 147, 249); otherwise they went elsewhere (Transcript, 248). The son of the appellant in this case was once sent to sit alone in the corridor (Transcript, 132).

Delos L. Huxtable, president of the school board, testified that all religious groups were to be treated alike, and that the teachers they brought into the school were to be approved by the superintendent, to whom was delegated supervision of this activity (Transcript, 127, 128).

Eugene Harvey Mellon, superintendent of schools, testified that he does not determine who are the teachers of religious education, and that they are determined by the representatives of the "Champaign Council of Religious

Education," but that the board has an unwritten reservation that the person should be qualified to teach and use good grammar and language. He said further that he did not consider what religious denominations desired to teach, and that Jehovah's Witnesses might use a room "if the person were qualified to teach properly." He added that: "As far as I know classrooms are available to a person who believes in no religion," and that: "The school buildings are now available to all religious denominations in this community to be used while they are being used by students" (Transcript, 117-119).

Upon being recalled, Mr. Mellon stated that "all the groups should work together; it would be hard for us as a board of education or as a superintendent to work with a lot of different groups" (Transcript, 127). He stated to a representative of Jehovah's Witnesses that orderly procedure was necessary (Transcript, 127); and the representative of that group testified that: "They said it would be possible, but we would have to go through the regular procedure" (Transcript, 123). When called as a witness for defendant, Mr. Mellon said that he told plaintiff "That would go a little further" when asked if he would permit the teaching of children not to salute the flag (Transcript, 239), although he earlier said that this could be done (Transcript, 118).

Rev. Herbert L. Miller, a minister of the Episcopal Church, President of the Champaign Council of Religious Education, testified that it was the policy of the Protestant curriculum committee "to prevent any material being used that would bring up controversies or difficulties" (Transcript, 227). Rev. Alva R. Cartlidge, pastor of the First Presbyterian Church of Champaign and chairman of the personnel committee selecting and approving teachers in the Protestant group, testified that: "We intend to pro-

tect the courses against antagonistic matter being taught. As far as we are able, we examine the material to be sure none is antagonistic to other religious organizations" (Transcript, 162). But a document prejudicial to other than Christians may once have been used (Transcript, 95).

The trial court found that: "The defendant school district has been willing to grant its permission for the similar free and equal use of rooms in the school buildings when not in use for school purposes, to any other faith or group which desires to make use of the schoolrooms belonging to the defendant, for instruction in the tenets or belief or unbelief of such other faith or groups" (Transcript, 65). But it adds that this may be subject to a provision that "their teachers had proper educational qualifications so that bad grammar for instance, would not be taught to the pupils," and, further, that the group must make application to the superintendent of schools "who in turn will determine whether or not it is practical for said group to teach in said school system" (Transcript, 65).

Testimony as to the matters indicated above is primarily by the president of the School Board (Transcript, 127); the superintendent of schools (Transcript, 117, 237, 267); the public school teachers, including those involved in the transactions with respect to Appellant's son (Transcript, 110, 132, 146, 254); and the religious education teachers (Transcript, 90, 137, 150, 222, 228).

Many other matters appear in the pleadings and evidence which are only incidentally relevant or material to the issues of the case. The religious, or they may be termed non-religious, views of appellant are developed both in pleading and in evidence (Transcript, 2, 46, 168, 208), and are contrasted with Unitarianism (Transcript, 217-222). The character and efficiency of the religious teaching are matters of testimony by the Protestant teachers (Tran-

script, 90, 137, 222), as are the Catholic (Transcript, 150), and Jewish (Transcript, 228); and this testimony is supplemented by ministers who have an active part in the plan of religious teaching (Transcript, 120, 128, 155, 225, 258). Thirteen students were called by the Appellee Board of Education, to testify that they were not coerced to take religious instruction, nor embarrassed by failure to do so, or by failure to continue, if they were once in a class for religious instruction (Transcript, 243-254, 259-267). The son of appellant, when the only person in his class not taking religious instruction (Transcript, 132), was embarrassed when placed alone in the hall or in the music room (Transcript, 177-178, 255).

As stated by the Supreme Court of Illinois, the appellant, Vashti McCollum, a resident and taxpayer in Champaign School District No. 71, sought by writ of mandamus "to prohibit the teaching of religious education in the public schools during the hours when the public schools are regularly in session. The defendant school district includes all of the schools and school buildings in the city of Champaign." By agreement of the parties three judges sat *en banc* in the trial of the case (Transcript, 61), and denied the writ of mandamus (Transcript, 89). This judgment was affirmed by the Supreme Court of Illinois (Transcript, 280).

ERRORS RELIED UPON.

1. The Supreme Court of Illinois erred in sustaining a plan of religious education in public schools which deprives of due process of law and denies equal protection of the laws, through a law "respecting an establishment of religion and prohibiting the free exercise thereof," in violation of the Fourteenth Amendment; such plan in its opinion applying to participating and non-participating sectarian groups and also to those who accept no creed, with the public expense borne equally by taxpayers of all such groups. The Supreme Court of Illinois denies a freedom of religion which is common to all and as to which all must be treated equally.

2. The Supreme Court of Illinois erred in sustaining a plan segregating public-school pupils into sectarian groups for religious education, with a separate segregation of those refusing to join in such education, such plan being violative of the Fourteenth Amendment to the Constitution of the United States. Such plan violates the constitutional guarantee of freedom of religion: encourages the creation and friction of sectarian groups in the public schools; forces the segregation of non-religious groups; and places a majority or dominant religious group in a controlling position in the public school system, which requires compulsory attendance except where there is attendance at a private or parochial school having designated standards.

3. The Supreme Court of Illinois erred in sustaining a discretion vested in an administrative body and officer to determine (1) what sectarian groups should be permitted to teach public school pupils in the public school

buildings and during school hours; (2) the character of religious teachers of such groups; and (3) the material to be taught; such discretionary powers in religious education in the public schools being in violation of the guarantees of due process of law and of equal protection of the laws of the Fourteenth Amendment to the Constitution of the United States.

SUMMARY OF ARGUMENT.

The assignment of errors summarizes the argument in this case. To such assignment may be added the statement of the Supreme Court of Illinois that appellant, a resident and taxpayer, "seeks to prohibit the teaching of religious education in the public schools during the hours when the public schools are regularly in session." In this respect it is argued that the state makes a law respecting an establishment of religion, in violation of the Fourteenth Amendment, by the development of sectarian groups in the public schools, and that such a development violates freedom of religion. If such a plan were valid, the power exercised by school authorities to determine who shall teach and what may be taught is invalid.

ARGUMENT.

I.

Public Schools and Sectarian Instruction.

Sectarian instruction and sectarian services are closely associated with public schools. The public school buildings are often subjected to religious use. By statute the state of Illinois permits the use of school buildings for religious meetings and Sunday schools, and for other educational and social interests "*when not occupied by schools*" (Illinois Revised Statutes, ch. 122, sec. 6-43; *Nichols* v. *School Directors*, 93 Ill. 61). This may be termed a part of the program of using school buildings as civic centers; and the opinions upon such use are discussed in 161 A. L. R. 398. Freedom of speech in the use of such buildings is considered in the recent case of *Danskin* v. *San Diego Unified School District*, 28 Cal. (2d) 536, 171 Pac. (2d) 885. Earlier cases upon religious meetings in school houses are found in 5 A. L. R. 886-890 and in 141 A. L. R. 1153. New York apparently does not now permit such use. University of the State of New York Bulletin, No. 1260. January 3, 1944, Law Pamphlet 6, Use of School Buildings.

The reading of one of the translations of the Bible, and other religious services, are common in the puolic schools of a number of states. Information upon this subject is found in the Bureau of Education Bulletin 1923, No. 15 on "The Bible in the Public Schools"; and a more complete discussion of cases will be found in 5 A. L. R. 866 and 141 A. L. R. 1144, and in 47 American Jurisprudence, Schools, Sections 208-215.

In several states, including Illinois, the Courts have held such proceedings invalid, even though students not desiring to attend the religious service were permitted to be excused from attending. *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *Knowlton* v. *Baumhover*, 182 Ia. 691, 166 N. W. 202, 5 A. L. R. 841 (1918); *Herold* v. *Parish Board*, 136 La. 1034, 68 So. 116 (1915); *Harfst* v. *Hoegen*, 349 Mo. 808, 163 S. W. 2d 609, 141 A. L. R. 1136 (1941); *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 44 N. W. 967 (1890). The *Ring* case involved a Protestant service and a Catholic objection, as did the Louisiana and Wisconsin cases, although the Louisiana case involved both Catholics and Jews. Catholic services were involved in the Iowa and Missouri cases. Voluntary attendance upon daily religious exercises was sustained in Indiana when all of the children were of Catholic parents; and the religious services not within the school building nor within school hours. *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348, 28 N. E. 2d 256 (1940).

In a number of states, statutes or school practices are the basis of a plan of releasing public school students for a short period of school hours, each week, such period to be applied to religious education, independent of the public school and not upon school property, upon the written request of the parent. Such a plan was sustained, independently of statute, by the opinion of *People ex rel. Lewis* v. *Graves*, 219 App. Div. 233, affirmed 245 N. Y. 195 (1927). A statutory provision was adopted in New York in 1940 providing that: "Absence for religious observation and education shall be permitted under rules that the Commissioner shall establish" (Sec. 625, Subdivision 2 of Paragraph B). The Superintendent of Education of New York has issued a rule for such absence, on the parent's request, for religious observance

"outside the school buildings and grounds" (University of State of New York, Bulletin No. 1260, January 3, 1944). A similar plan, adopted by the Board of Education of the City of Chicago, was sustained by the Supreme Court of Illinois in *People ex rel. Latimer* v. *Board of Education of the City of Chicago*, 394 Ill. 228 (1946). Statutory authorization of such a plan is found not only in New York but also in Iowa, Kentucky, Maine, Minnesota, Oregon, South Dakota and West Virginia; Minnesota permitting an absence of three hours a week (Minnesota Statutes, sec. 132.05, subdivision 3); and the operation of such a plan is not limited to the states here mentioned. Something as to its use will be found in "Weekday Classes in Religious Education," Bulletin 1941, No. 3, Federal Security Agency, U. S. Office of Education.

Credit has normally been given by the public schools for school work done in parochial schools of recognized standards. The Supreme Court of the State of Washington has, however, held that a public school student cannot be given credit in the public school for Bible study outside of the school. *State ex rel. Dearle* v. *Frazier*, 102 Wash. 369 (1918). The State Department of Education of the State of New York has approved the grant by a local board of education of "one complete high school credit to pupils who successfully complete a satisfactory course of religious education given on released time by approved outside religious agencies."

The furnishing of books and of transportation to students in parochial schools at public expense have been sustained by this Court. *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370 (1930); *Everson* v. *Board of Education*, 330 U. S. 1 (1947). Relevant cases have been discussed in the *Everson* case, and will also be found discussed in 118 A. L. R. 806; 146 A. L. R. 625,

which annotates *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61; 135 Pac. (2d) 79 (1943); and in the recent case of *Bowker* v. *Baker*, 73 Cal. App. 2d 653, 167 Pac. 2d 256 (1946). Attention may also be called to the statement in *Board of Education* v. *Wheat*, 174 Md. 314, 199 Atl. 628 (1938), quoted with approval in *Chance* v. *Mississippi State Text Book Rating and Purchasing Board*, 190 Miss. 453, 469, 200 So. 706 (1941), that:

> "School attendance is compulsory and attendance at private or parochial schools is compliance with the law."

The following statement on page 338 of the dissent in *Board of Education* v. *Wheat* is also important:

> "It is a fact that, to the extent of the education afforded by private schools, including those of the denominational or sectarian class, the pupils in the public schools are lessened, and thereby the general taxpayers of the State are greatly benefited by the corresponding reduction in the cost of public school education, although the burden upon a large class of these taxpayers is increased by the additional expenses of private education * * *"

The aid is to the pupil, and the parochial school is a financial aid to the local taxing body.

The relations between public schools and sectarian institutions heretofore indicated with respect to (1) release of time for the purpose of religious instruction and (2) the furnishing of books and transportation of students in parochial schools, involve no public expense or public service for sectarian groups; no segregation of religious or non-religious groups in the public schools; and no right or opportunity to engage in control of who may teach and what may be taught by sectarian or non-religious groups.

The issue now for the first time presented to this Court involves (1) a public service to sectarian public school instruction through both personal help and school facilities, (2) an instruction in the school building and during school hours which will segregate the various religious and non-religious groups in the public school, and (3) a control by the school authorities of what religious views may be taught and how they may be taught.

The purpose of the plan here at issue is obvious. Present statistics are not available from the Bureau of the Census, but from 1926 to 1936 there was a substantial decrease in Sunday School attendance both in the United States as a whole and in the State of Illinois (Bureau of the Census: Religious Bodies; 1936, pp. 166-7, 168-9). No question is here raised as to whether the churches have performed their duties. The plan of dismissing public school students for an hour or more each week for religious instruction has not brought sufficient result. Children who are not going to parochial or private schools must attend the public schools, and whether the pressure indicated at pages 25-26 of this brief is or is not to be construed as leading to a voluntary result, it may be expected to have an influence upon the younger students who must be available in the public school. A solicitation is made possible to all who attend the public school in its lower grades and substantially all must attend.

In *Everson* v. *Board of Education*, 330 U. S. 1 (1946), this Court states at pages 15-16 the principle applicable to this case:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from

church against his will or force him to profess a belief or disbelief in any religions. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' *Reynolds* v. *United States, supra* (98 U. S. at 164, 25 L. ed. 249).'"

By operation of the 14th Amendment this statement applies to the states as well as the United States, and unless this principle is applied, a constitutional clause acting as "a wall of separation between Church and State," will become a wall uniting Church and State.

II.

Public Aid to Sectarian Groups.

This Court has said that:

> "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations and groups and vice versa." (*Everson* v. *Board of Education*, 330 U. S. p. 16)

This statement carries with it an expenditure of public money raised by taxes as well as the levy of a tax.

It also relates to "religious organizations" such as the

Champaign Council of Religious Education, and to any similar but competing organizations which may establish themselves in the same territory.

The degree of school room occupation and the service of employees and teachers are sufficiently set forth on pages 6-9 of this brief.

The public school teachers distribute the cards to elementary students with respect to religious education and such cards were usually returned to the teachers for delivery to the religious teachers (Transcript, 94, 133, 148, 176, 253). Printed schedules are delivered to junior high school students by the school authorities and apparently bear a printed indication of right to register for religious instruction (Transcript, 153, 234, 240). The school authorities determine the rooms to be used by each sectarian group (Transcript, 150, 241), the room for secular teaching often being used, and the public school teacher often remaining throughout the period of religious instruction, turning over her class for such instruction and then re-assuming control on the expiration of the period for religious teaching (Transcript, 92, 133, 137, 241). The schedules for junior high school students are printed at the expense of the board of education (Transcript, 240). In May, 1945, the board of education mimeographed 500 parent request cards (Transcript, 176, 223, 240), to be used with the grades for which it received $1.05 from Miss Chapin (Transcript, 240, 266), teacher of religious education, on behalf of the Champaign Council on Religious Education. This payment is the only one at any time made.

The trial court stated "that no direct appropriation of any kind, or a direct expenditure of money of any kind, is made by the defendant school district for or on behalf of said religious education classes" (Transcript, 69, 240); and it added that "to some slight extent the defendant has in-

directly appropriated public funds for the use of these classes, by the furnishing of rooms in public school buildings, light, heat, janitor service, and so forth * * *" (Transcript, 70).

It is obvious that the services rendered by the school employees and teachers and the occupancy of rooms would have cost a substantial amount had the religious groups been requested to pay for them as a private enterprise. The Supreme Court of Illinois says that the principle of *de minimis non curat lex* should apply in this case, but the record shows a substantial service of rooms and individual help. Moreover, this Court says that the same principle applies whether the amount be "large or small." If the amount were computed as the ordinary expense for personal services and use of rooms it would not be unduly small.

The constitutional provisions of the State of Illinois are not here involved, but Article VIII, section 3, of that constitution forbids any governing body to "make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose," and further forbids any help to support or sustain, or any grant or donation of any real or personal property for any sectarian purpose.

The New York Constitution, Article XI, section 4, contains a provision similar to that of Illinois, forbidding the use of public money in aid of any school, "under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught." In *People ex rel Lewis* v. *Graves*, 219 App. Div. 233; 219 N. Y. S. 189 (1927), the court said, 219 App. Div. page 236:

> "Here there was no property or public money used in aid or maintenance of any denominational school. Cards not provided by the school were distributed and the parents indicated thereon the place they wished

their children to go for instruction. It was entirely voluntary with the parent whether the child was excused. There was some 'check-up' afterward to indicate whether the privilege should be withdrawn. All that the petitioner can claim in regard to public expense is the time spent by the teacher during school hours in thus issuing or receiving the card, excusing the child, and ascertaining if possible, if the parent's direction had been obeyed. The acts of the teacher are the same as when excusing a child to attend any religious or secular ceremony at its parent's request. It is a part of ordinary school routine and discipline. The Constitution is designed for practical purposes and deals with realities, not fictions or conditions largely imaginary * * *. Its commands are not violated by acts so trivial and remote."

In 245 N. Y. 195 (1927) the Court of Appeals sustained this decision, with the statement that:

"The city of White Plains does not use public money to aid the church schools, although the cooperation between the public schools and the church schools requires a slight use of the time of the school teachers in registering and checking up excuses * * *. The separation of the public school system from religious denominational instruction is thus complete."

In *Stein* v. *Brown*, 211 N. Y. Supp. 822, 125 Misc. 692 (1925), a supreme court of the State of New York, with respect to the mere printing of cards for a committee on week-day religious education (parallel with the mimeographing in the present case), said:

"The cards hereinbefore mentioned were printed during school hours upon the presses and upon the property and premises of the Board of Education or the city. The action of the defendants was to that extent unlawful and in violation of Article IX, section 4 of the State Constitution * * *."

In the New York Supreme Court and in the Appellate Division the *Stein* case was said to be limited to its facts (215 N. Y. Supp. 632; 219 N. Y. Supp. 189, 193), but the opinion has not been overruled. The constitutional provision has since been amended but only to grant power to transport children to and from private schools, a change brought about in 1938 by *Judd* v. *Board of Education*, 278 N. Y. 200, 15 N. E. 2d, 576 (1938); 118 A. L. R. 789.

The facts of this case do not require dependence upon the *Stein* case. In the present case the use of public money directly for sectarian instruction is several times as great as is the use of money involved in *People ex rel Lewis* v. *Graves*, for other than directly sectarian instruction by public schools. In the present case the service to sectarian groups is not "a part of ordinary school routine and discipline," as in the *Graves* case.

The fact that no direct appropriation has been made and that expenditures have been made in such a manner as not to be reduced to dollars and cents is not controlling. If it were, the constitutional restrictions could be easily avoided. Both state and federal constitutions forbid sectarian use of any public fund or of any grant or donation of public land, money or other personal property for any sectarian purpose. The statement in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 340, is clearly applicable:

> "The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. The prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in the public schools."

This Court is expected to consider the normal value of services rendered by the School District. Such value cannot be specifically determined, but the proportional service

to the sectarian groups and its proportional cost may well be considered.

The plan here at issue is parallel with that defeated by Thomas Jefferson and James Madison, and disapproved by this Court, except that the Virginia plan proposed in 1784 provided a more orderly distribution of government support. (*Everson* v. *Board of Education,* 330 U. S. pp. 11-12, 63-74). Moreover, the plan here at issue, if approved, places no limit upon the time and facilities furnished to sectarian groups by public schools, unless this Court should regard authority to impose such limitations as within its jurisdiction. If a half-hour of sectarian religious education is proper in public schools during school hours, with the assistance of public school teachers, longer periods must be sustained, if adopted.

As a matter of fact it is not the use of public school buildings and of public school teachers which violates the constitution; it is the maintenance of instruction by religious groups in the public schools through the use of the resources of such schools. If all sectarian and non-sectarian groups are to take over school rooms during school hours, the purposes of the public school will be defeated.

III.

Sectarian Grouping in the Public Schools.

The Supreme Court of Illinois says that the plan here at issue is one of "voluntary religious classes in the public schools • • • conducted upon a purely voluntary basis."

Attendance at the public school is not voluntary. A request through the public school that the parents "*please permit*" their children in the fourth, fifth and sixth grades to take one of four types of religious education, two of

which are now non-existent (Transcript, 176), is not on a purely voluntary basis. A voluntary segregation of religious groups may result from a favorable reply to the request by the public school that students join one of the groups; but there can be nothing voluntary in the segregation of those who do not join one of the groups. Such is the situation in this case, with a son the only member of a class who did not take religious education, and it was only natural that his teacher might ask him to release her by taking religious education (Transcript, 179).

As previously indicated, the plan in this school district is at present and has for sometime been that of religious instruction for Protestant and Catholic, with provision of public school rooms and of school time periods for such instruction, and with other provisions for those who do do not register. Each group would obviously know the membership of other groups, and each individual of a class would know when one or more members were not taking religious education (Transcript, 255, 257).

People ex rel. Ring v. *Board of Education*, 245 Ill. 334 (1910) involved a public school having a single religious exercise, subject to a right to be excused therefrom. With reference to the excusing of a pupil, the Supreme Court of Illinois said, at page 351:

> "The exclusion of a pupil from this part of the school exercises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated."

That this statement applies to the present case is indicated by the fact that his teacher advised the appellant to have her son join the religious education class (Transcript, 192).

The *Ring* case involved a Protestant service and a Cath-

olic objection. A similar situation recently presented itself with respect to a Catholic service and the possibility of a non-Catholic being excused, in *Harfst* v. *Hoegen*, 349 Mo. 808; 163 S.W. 2d, 609; 141 A.L.R. 1136 (1941). With respect to a Catholic service from which others could be excused, the Iowa Supreme Court in *Knowlton* v. *Baumhover*, 182 Ia. 691, 166 N.W. 202, 5 A.L.R. 841 (1918) quoted with approval a statement of the Louisiana Court, substantially identical with that of the Supreme Court of Illinois, in a case of Protestant religious service objected to by Jews and by a Catholic. *Herold* v. *Parish Board*, 136 La. 1034; 68 So. 116, L.R.A. 1915D, 941; Anno. Cas. 1916 A. 806. A similar view is taken in *State ex rel. Weiss* v. *District Board*, 76 Wis. 177; 44 N.W. 967.

In the present case there are three religious groups and religious education classes, with one of the three abandoned for several years, with a possibility of an increased number of such classes, and with a right not to register students for any one of the religious classes.

With respect to the students who are registered, there will in practically all areas of the state be one religious group which has a substantial majority, either Protestant or Catholic; and in substantially all areas the Jews will be in a small minority. And if Jehovah's Witnesses are given an opportunity to teach in the public schools, an opportunity to which they are entitled should the present plan be sustained, they have a constitutional right, even though a small minority, to make a general attack on all organized religious systems and to distribute literature of a provocative, abusive and ill-mannered character. *Cantwell* v. *Connecticut*, 310 U. S. 296, (1940), page 309; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, pp. 115-116; 63 S. Ct. 870; 146 A.L.R. 81. All other religious organizations have equal rights in the public school, if there is a right of sectarian groups to teach in such schools.

Those who register for religious teaching in public schools by small sectarian groups may not have the feelings of an individual student which are described in the *Ring* case, but their segregation in religious teaching in the public schools will be advertised to other students by the school. By way of illustration, if there were an anti-Semitic attitude leading to an attack upon Jewish students by others, as has been the case in Chicago, the public school would furnish information as to those to be attacked. *Race Relations in Chicago,* page 5 (Report of the Mayor's Committee on Race Relations, December, 1944). The same result may develop as to any minority group, with respect to which religious friction may exist. This problem may not be material in School District No. 71 of Champaign County, but this Court is asked to establish a principle of general application.

It may, however, be urged that any public difficulties may be avoided by exercising a right not to register for religious teaching. This case involves the exercise of such right by appellant, Vashti McCollum, with respect to her son, James Terry McCollum (Transcript, 192), on the basis of belonging to neither Christian nor Jewish religious groups. Both testified to an embarrassment occasioned by such action (Transcript, 175, 193), and his teacher as defendant's witness, testified to steps taken by her with respect to his situation (Transcript, 257). Testimony on the part of defendant by three of James Terry McCollum's classmates (Transcript, 243, 260, 266), and by one student not his classmate (Transcript, 250), that they did not hear him teased or know of his embarrassment, are of no weight as to the effect upon him, nor is a similar statement by his teacher (Transcript, 255); and there is admission that he was once placed in the hall (Transcript, 255), and that children left in the room for religious teaching were conscious of a student's leaving the room (Transcript, 257).

The defendant School District and intervenors produced thirteen students as witnesses to testify that no pressure was upon them to take religious courses, and that they were not embarrassed by failure to take, or to continue in such courses (Transcript, 245-254, 259-266). A majority of these witnesses were Junior High School students, and it was not common that the religious courses be taken by a majority of students in the grades of the junior high school (Transcript, 258). Moreover, ten of them testified to intimate contact with local Protestant churches which participated in the public school courses, but which would not have embarrassed their members or attendants whom they may have regarded as having adequate religious teaching (Transcript, 246, 247, 252, 253, 254, 260, 261, 262, 264, 265).

This testimony has no bearing upon minority religious groups, nor upon individuals whose views may not accord with organized religious groups. Moreover, the testimony of these students that they were not embarrassed by failure to take or to continue religious training is negative evidence so far as it may involve the embarrassment of James Terry McCollum, and such evidence has long been considered as of light weight as against positive evidence by the parties directly involved. *C. D. and V. R. R. Co.* v. *Coyer*, 79 Ill. 373, 377 (1875). Nor is it material that witnesses testified as to the beneficial advantage to themselves of the religious teaching in public schools, as in the case of the daughter of the intervenors (Transcript, 153). There is no denial of the advantage of religious teaching. The issue is one as to such teaching in public schools, where friction may result which our constitutions have sought to prevent. And attention may be called to the fact that the embarrassment of James Terry McCollum, testified to in this case, is of the character indicated in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351, as arising

under such circumstances; and attention may be further called to the fact that a similar position has been taken by the Supreme Courts of Iowa, Louisiana, Missouri and Wisconsin.

Friction in religion has been a characteristic of children which is not uncommon among adults—a characteristic which has in the past brought some conflict among children of different religious groups, even in the absence of separate public school classifications which would obviously differentiate religious groups, and lay the basis for religious controversy.

A further differentiation of religious groups may bring about the establishment in the same territory of several organizations similar to the Champaign Council of Religious Education, but competing with each other.

Although the trial court found that James Terry McCollum was not subjected to embarrassment because of his religious opinions (Transcript, 68), it recognized that there is "natural embarrassment to a child in being the only one in his room who did not take the religious education course and who went out of the room to study by himself because of that fact" (Transcript, 69). This is precisely the embarrassment indicated by the Supreme Court of Illinois in the *Ring* case, and by the highest courts of four other states.

It must also be understood that the segregation which is an essential part of the system here at issue sets up lines of distinction between the several religious groups and between religious and non-religious groups—it distinguishes minorities which may be subject to attack. And enmity toward the Jews as a minority group is likely to be developed or expanded by implications that they contributed to the death of Christ, as was indicated in an outline used by the chief religious teacher of the Protestant churches (Transcript, 95, 98). Such plans are explicitly

condemned in *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637, 638:

> "Free public education if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party or faction
> • • •
>
> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend upon the outcome of no elections."

IV.

Censorship of Religion by Administrative Action.

The Supreme Court of Illinois says "that the question of discretion amounting to delegation of legislative power was not raised in any manner in the trial court." Testimony before the trial court upon this matter is summarized at pages 9-11 of this brief. That court said:

> "Before any faith or other group may obtain permission from the defendant for the similar, free and equal use of rooms in the public school buildings such faith or group must make application to the superintendent of schools of said School District Number 71, who in turn will determine whether or not it is practical for said group to teach in said school system." (Transcript, 65)

The trial court recognized a power to determine what religious groups shall teach in the public schools, and the Supreme Court of Illinois says in its opinion that "Questions of policy are solely for the determination of the board,

and when they have once been determined by it the courts will not inquire into their propriety."

Appellees, in their Statement Opposing Jurisdiction with Motion to Dismiss, say that: "Additional groups, even atheists, are to be fully permitted to participate in the program on the same terms * * *. Lesson materials and curriculum are selected by a committee to avoid any offensive, doctrinal, dogmatic or sectarian teaching."

This statement admits a control over what is to be taught, but disagrees with the statement of the trial court as to a supervision over what sectarian groups shall be permitted to teach.

If sectarian groups may be permitted to teach in public schools during regular school hours, and as a part of the public school system, the question presents itself as to a censorship controlling either what groups may teach or what they may teach. That such a censorship may not be employed is clearly established in *Cantwell* v. *Connecticut*, 310 U. S. 296, this Court saying at page 305:

> "It will be noted, however, that the Act requires an application to the secretary of the public welfare council of the State; that he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. If he finds that the cause is not that of religion, to solicit for it becomes a crime. He is not to issue a certificate as a matter of course. His decision to issue or refuse it involves appraisal of facts, the exercise of judgment, and the formation of an opinion. He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by th e First Amendment and included in the liberty which is within the protection of the Fourteenth."

The school authorities do not have the constitutional au-

thority to permit religious teaching in school rooms and during school hours; but, if they did have such power, they could not discriminate. The standard is indicated in *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, pp. 115-116:

> "Considerable emphasis is placed on the kind of literature which petitioners were distributing—its provocative, abusive and ill-mannered character and the assault which it makes on our established churches and the cherished faiths of many of us. See *Douglas* v. *City of Jeanette*, 319 U. S. 157, 63 S. Ct. 877, 87 L. ed. 1324, concurring opinion, decided this day. But those considerations are no justification for the license tax which the ordinance imposes. Plainly a community may not suppress, or the state tax, the dissemination of views because they are unpopular, annoying or distasteful. If that device were ever sanctioned, there would have been forged a ready instrument for the suppression of the faith which any minority cherishes but which does not happen to be in favor. That would be a complete repudiation of the philosophy of the Bill of Rights."

An effort to control as to what religious groups may teach in public schools, and as to how they may teach, is a violation of religious freedom, and an effort to permit such teaching without control would add to the frictions which at the best make such instruction violative of religious liberty.

And attention may again be called to the fact that segregation of public school pupils into religious groups in public school buildings and during school hours is itself a deprivation of freedom of religion in violation of the Fourteenth Amendment; and that, if such plan were valid, it would become substantially unworkable upon the assertion of their constitutional rights by antagonistic and controversial groups.

Were the plan here at issue to be sustained, it would be proper and probable that competing groups similar to the Champaign Council of Religious Education establish themselves in the same territory and each seek dominance in the public school system.

The asserted power to segregate pupils into religious groups and to superintend their religious training in public school rooms and at public expense during regular school hours does not exist; but, if it did, the plan here at issue is unconstitutional in that the choice of religious groups and the supervision of their teaching is under control of the public school authorities. The record shows that such control is asserted. The school officers did, in fact, testify that all sects would have equal rights, but by qualifying such statements they materially restrict equality of rights and the freedom of the various sects.

Conclusion.

The Appellant asks this Court to determine whether sectarian groups may be permitted to teach in public school buildings during school hours, and substantially as part of the public school system. If such teaching is permitted, Appellant asks if school authorities may be permitted to determine who shall teach and what may be taught.

Respectfully submitted,

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